The Indiana Prosecutor

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RECENT DECISIONS

UNCOOPERATIVE DEFENDANT ? FILE MOTION TO COMPEL

State v. Berryman
_____N.E.2d_____
(Sup. Ct. 1/9/04)

After Alan Berryman was charged with murder, he filed a Notice of Defense of Mental Disease or Defect and a Motion to Waive Appointment of Experts. In the second of these motions, Berryman explained that he had retained the services of two psychiatrists who would be called at trial to testify regarding Berryman's defense. In his motion, Berryman also advised the trial court that if the court failed to waive such an appointment, upon the advise of counsel, he would refuse to talk to any court-appointed experts. The trial court chose not to honor Berryman's waiver and pursuant to statute appointed a psychiatrist and a psychologist to evaluate him.

Berryman and his counsel met briefly with each of the court-appointed experts. In each instance, counsel advised the expert that Berryman had been instructed not to answer any questions the expert posed. Following Berryman's refusal to talk with the court's experts, the State filed a motion to exclude the testimony of Berryman's expert witnesses. Both defense experts had evaluated Berryman and concluded that he was insane at the time of the murder.

One day before trial, the trial court inquired of the State why it had not sought an order compelling Berryman's cooperation with the court-appointed experts. The State responded that it did not need to seek such an order. The trial court thereafter denied the State's motion to exclude, and both of Berryman's experts were permitted to testify at trial. Both court-appointed experts testified regarding Berryman's refusal to cooperate with them. The jury found Berryman not guilty by reason of insanity.

Two reserved questions of law were presented to the Court of Appeals in this case. The first question posed was, "Whether defense counsel should be allowed to attend a client's evaluation with court-appointed experts when the sole purpose

of that attendance is to advise their client not to cooperate." Secondly, the Court was asked to render its opinion on "Whether testimony of defense experts can be excluded if the defendant refuses to cooperate with the statutorily required court-appointed experts."

The Court of Appeals agreed with the State that the trial court erred in allowing defense counsel to attend Berryman's evaluations when his stated purpose was to instruct the defendant not to cooperate. A defendant has no right to counsel at an evaluation conducted by a court-appointed expert. Such an examination is not a critical stage of the proceeding to which the assistance of counsel guarantee applies, the Court said. The Court went on to say that "advising a client not to cooperate is an 'obstructive tactic' which should be prohibited." Therefore, where counsel's sole stated purpose is to advise his client not to cooperate with the expert, counsel should not be allowed to attend the evaluation.

On the second issue, noting that there had been no order to compel requested, Judge Nancy Vaidik wrote, "Had there been such an order compelling Berryman's cooperation and a hearing advising him that the testimony of his experts could be excluded if he failed to cooperate with the court-appointed experts, the result in this case may have been different." The Supreme Court granted transfer for the sole purpose of modifying that one sentence of the Court of Appeals' opinion. The Supreme Court on January 9, said, "Had there been such an order compelling Berryman's cooperation, and a hearing advising him that the testimony of his experts could be excluded if he failed to cooperate with the court-appointed experts, the State would have prevailed on this issue." Bottom line: Request an order compelling cooperation of an uncooperative defendant with court-appointed experts. In all other respects, the opinion of the Court of Appeals was summarily affirmed.

VENUE PROPER IN EITHER COUNTY

Baugh v. State
____N.E.2d_____
(Sup. Ct. 1/15/04)

Henke v. State
_____N.E.2d____
(Sup Ct. 1/15/04)

When a person is operating a vehicle while intoxicated on a street whose center lane is the border of two counties, in which of the two counties can the driver be legally prosecuted? The Indiana Supreme Court dealt with this question in two separate opinions issued January 15, 2004. In both, the Court held that venue in either county is proper.

Harry Baugh was driving eastbound on the south side of 96th Street. That street forms the boundary between Hamilton and Marion counties. Baugh was driving solely on the Marion County side of the street. A Carmel (Hamilton County) police officer pulled Baugh over after the officer observed Baugh's car weaving and exceeding the speed limit. After Baugh failed a field sobriety test and administration of a chemical test revealed his blood alcohol content to be .10, Baugh was arrested and charged with Operating While Intoxicated a Class D Felony, in Hamilton County. Baugh was convicted in Hamilton Superior Court but that conviction was reversed by the Indiana Court of Appeals. The Court of Appeals held that in Baugh's case all evidence pointed to the existence of venue in Marion County. The Court of Appeals reasoned, therefore, that Indiana's venue statute (which provides for venue in either county when the crime occurs on a highway bordering two counties) had to yield to Baugh's state constitutional right to be tried in the county where the crime was committed.

The Supreme Court granted transfer and affirmed the trial court. The Supreme Court found that Baugh's offense had sufficient nexus to Hamilton County. Dangerous operation of a vehicle on one side of the highway is a hazzard to the entire road, the Supreme Court said. "Operators of vehicles

know or should know they trigger consequences on both sides of the road." The statute that allowed for the filing of charges in Hamilton County was held to be constitutional.

In a companion case, *Henke v. State*, decided the same day, the Supreme Court again held that concurrent venue is constitutional for offenses committed by operating a vehicle on a highway forming the boundary between two counties. For the reasons cited in *Baugh*, the Supreme Court affirmed the trial court in its denial of Henke's motion to dismiss.

SUPREME COURT DENIES TRANSFER
State v. Owen
No Seatbelt in SUV Required

On September 30, 2003, the Indiana Court of Appeals concluded that the statutory definition of a "truck" does not exclude SUV's. If, therefore, an SUV bears a license plate designated as a "truck plate" the driver of that vehicle is driving a truck, the Court of Appeals said. Because Jon Owen's SUV was plated as a truck, the Court held that the seatbelt statute did not apply and Owen's seatbelt conviction was reversed.

On January 9, 2004, the Indiana Supreme Court denied transfer in the *Owen* case. Occupants of an SUV plated as a truck do not have to wear their seatbelts. That's the law.

Legislation has been introduced that would require front seat passengers in trucks and SUV's to wear their seatbelts when that vehicle is in forward motion. Watch for further developments in this area.

FROM THE
UNITED STATES SUPREME COURT

Illinois v. Lidster
_____N.E.2d_____
(1/13/04)

Approximately one week after a 70-year-old bicyclist was killed by an unknown motorist in Lombard, Illinois, local police set up a highway checkpoint designed to get more information about that accident from the public. Police cars with flashing lights partially blocked the eastbound lanes of the highway where the bicycle-car collision had occurred. This action forced traffic to slow down, leading to lines of up to 15 cars in each lane. As a vehicle approached the checkpoint, an officer would stop it for about 10 to 15 seconds. During the stop, the officer asked the occupants of the vehicle if they had seen anything happen at that location the previous weekend. The officer would also hand the occupants of the stopped vehicle a flyer that described the incident. The brochure also asked for assistance in identifying the vehicle and driver who had hit the bicyclist.

As Robert Lidster drove his minivan toward the checkpoint, his van swerved and he nearly hit one of the officers. When an officer approached Lidster's vehicle he immediately smelled alcohol on Lidster's breath. The officer directed Lidster to a side street where a second officer administered field sobriety tests. Lidster was then arrested. He was tried and convicted of driving under the influence of alcohol.

The Illinois Supreme Court found the checkpoint utilized by the Lombard police unconstitutional. The Illinois Court based its conclusion on the fact that there was no reason to suspect that any motorist stopped by the police had been involved in a crime. The Illinois Court cited as authority the earlier U.S. Supreme Court case of *Indianapolis v. Edmond* (U.S. Sup. Ct. 2000). The U.S. Supreme Court in *Edmond* held a drug roadblock set up by the Indianapolis Police Department to be unconstitutional. The U.S. Supreme Court held that the officers in *Edmond* lacked individualized suspicion that the drivers stopped were involved in

a crime when they walked around stopped cars with drug-sniffing dogs seeking evidence of drug crimes,

The U.S. Supreme Court in *Lidster* reversed the Illinois Supreme Court. All nine U.S. Supreme Court justices agreed that roadblocks could in some circumstances be constitutional depending upon the circumstances of the particular roadblock. The justices split, however, on the constitutionality of the roadblock in Lidster's case. The majority held that the police in this case had properly established an "information seeking checkpoint". The majority held that given the "grave" public concern regarding the fatal crash that had occurred at the roadblock's location just a week earlier, the well-planned manner in which the roadblock was executed, and the minimally intrusive nature of the stop, the roadblock was constitutional. Lidster's conviction was affirmed.